No. 487.
Br. of Templeton for Def't.
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Supreme Court of the United States.

OCTOBER TERM, 1901

No. 487.

THOMAS SWAFFORD, PLAINTIFF IN ERROR,

vs.

W. A. TEMPLETON AND S. H. PEARCY.

(18,340)

Brief for Defendant in Error.

In Supreme Court of United States.

No. 487

THOMAS SWAFFORD, in error,

vs.

W. A. TEMPLETON AND S. H. PEARCY.

Brief for W. A. TEMPLETON, Defendant

I

The declaration. Record 2-6.

Plaintiff claims damages personally against defendants, acting as Election Judges at the State and National Election; held November 6, 1900.

It should be noted that—

(a) There is no allegation of personal discrimination against plaintiff.

(b) Plaintiff concedes that defendants offered to allow him to vote, if he would comply with the State law and regulations as other voters of his County did, and that he failed to do so or even attempted to do so.

(c) Plaintiff seeks to excuse himself by alleging that the State law under which defendants were acting, was in violation of a provision of the State Constitution but he shows that "the defendants were a majority of a board of three election Judges, appointed by the board of election commissioners in and for Rhea County to hold said election."

Rec. 3.

It thus appears from the declaration that these defendants were appointed to hold said election, by the authorities, viz.: "The board of election commissioners," named in the State law attacked, and that defendants were not lawfully holding said election, if said law was in violation of the State Constitution. Independently of that law, the Judges of election could only be appointed by the County Court.

(d) Plaintiff's only claim of Federal Jurisdiction and of personal damage against defendants is based on his assumption that by the Fourteenth amendment to the Federal Constitution Section 1, it is provided that "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiff insists that this provision is violated and that he is entitled to damages because the State law under which said election was regulated and which prescribed the qualification of voters, is in violation of the State Constitution. It is sought to get this Court to adjudge, first, that said State law was in violation of the State Constitution and that said election should have been held under the previous law. Second, that, by the previous State law, complainant would have been entitled to vote, without registration and marking of his ballot, which regulation the new law required, and, third, that said Fourteenth Amendment entitled plaintiff to vote according to the regulations applicable to voters under the former State law, in an election held by officers appointed and acting under the new law and sworn to execute its provisions.

Defendants demurred to the declaration and the demurrer was sustained and plaintiff's suit was dismissed both on the grounds stated in the demurrer and because no Federal question was presented.

Rec. 7-10.

We append to this Brief, Copies of the Tennessee Statute containing the provisions of the "Dortch Law" material to be now considered and the material provisions of the general law of the State here involved and applicable to counties not coming under the "Dortch Law." The quotations are from "Shannon's Code of Tennessee," the latest (1894). We also quote in said appendix the material provisions of the Act of 1899, which applies said "Dortch Law" to Rhea county, and which is the Act assailed by plaintiff.

II

We now submit,

(1) A Federal question is not involved simply because a National Election is being held. Although the right to vote at a National Election, is secured by the Federal Constitution, yet Congress has so far left the qualifications of voters to the several States. So of regulations governing the election, with certain qualifications as shown in U. S. Rev. Statutes 5508 to 5520 not involved in this suit.

We cite the U. S. Constitution Art. 1, Sec. 4, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof but the Congress may, at any time, by law, make or alter such regulations except as to the places of choosing Senators."

The U. S. Constitution and laws do not confer upon the citizen the right to vote but only the right not to be discriminated against as a voter.

Menor vs. Happersett 21 *Wall.* 162.
U. S. vs. Reese, 92 *U. S.* 214.
McPherson vs. Blacker, 146 *U. S.* 1.
Cooley's Principles of Constitutional Law 291.
U. S. vs. Cruikshanks, 92 *U. S.* 542.
Ex Parte Yarbrough, 110 *U. S.* 651.
In Re Coy, 127 *U. S.* 749.

(2) As the Congress has not passed laws regulating national elections except so far as to prevent discriminations or intimidation, in the absence of an averment that plaintiff was discriminated against or intimidated, no question arises under the Federal Constitution or laws. The opinion of the trial Court is correct.

Rec. 9-10.

In Ex Parte Yarbrough, 110 U. S. 651, intimidations and conspiracy were alleged.

In Wiley V. Sinkler, 179 U. S. 59, it was alleged, without qualification, that a national election was being lawfully held, that plaintiff was a lawful voter and that his vote was unlawfully re-

fused—a case of unlawful discrimination. But plaintiff went out of Court for want of an averment of registration required of voters by State law.

(3) This Court will not pass on the question whether the Act of 1899, Ch. 163, placing Rhea County under the provisions of the "Dortch Law," was in violation of the State Constitution or not. Nor will this Court entertain an action to hold defendants personally liable in damages for impartially executing a law under which they were appointed.

The declaration shows that defendants were appointed as Election Judges by the Election Commissioners of Rhea County. This was according to the "Dortch Law," otherwise, elections are held by the Sheriff and the Inspectors or Judges appointed by the County Court.

See Appendix.

If the special Act placing Rhea County under the provisions of the "Dortch Law," is unconstitutional by State Law, then defendants were not lawfully Judges of Election and were without authority. There was therefore no lawful election.

10 *Amer. & Eng. Ency.* 671.

Schafe vs. Tillman, 2 *Bart. El. Cases* 907.

In Wiley V. Sinkler, 179 U. S. 66, this Court refused to pass on the Constitutionality of the State law on the subject of registration, in case alleging a lawful election and reserved the question as to whether election Judges lawfully appointed, were liable in damages for refusing a vote which the State statute forbade them to receive.

That they were not liable, see—

Mechem on Pub. Officers, 638-9.

McCrary on Elections, 254, 257.

Brightly's Lead. Cases on Elections, 190.

10 *Amer. & Eng. Ency.* 675.

State vs. Slatem, 46 *Tenn.* (6 *Cold.*) 246.

Rail vs. Potts, 27 *Tenn.* (8 *Hump.*) 225.

(4) All special Acts are not unconstitutional by the constitution of Tennessee. A special Act must contain some unjust

discrimination and work a real injury, to make it obnoxious to the inhibition against class legislation.

Although the constitution provides for Circuit and Chancery Courts throughout the State, yet special Courts may be created for particular counties.

State vs. Lindsay, 103 *Tenn.* 635.
Coleman vs. Campbell, 3 *Shan. Tenn. Cases* 355.
Halsey vs. Gains, 2 *Lea* (*Tenn.*) 316.

So of an act authorizing particular counties to subscribe to R. R. Stock.

Lauderdale Co. vs. Furgison, 75 *Tenn.* (7 *Lea*) 153.

So of an Act giving "Cotton merchants a special tax.

Parker vs. Parks, 68 *Tenn.* (12 *Heisk.*) 633.

So of game laws applicable to particular counties.

Act 1901, *Ch.* 259 *p.* 571.

So of a special act creating board of Road Commissioners for certain counties.

Act 1901, *Ch.* 8 *p.* 10.

This act was assailed on the same grounds urged by plaintiff in the case at bar, in the case of Condon et al Road Commissioners vs. Maloney, Judge of Knox County, decided by Supreme Court of Tenn., Sept., 1901. The act was sustained.

See certified copy of Mss. opinion filed with the clerk of this Court.

So the "Dortch Law" itself was sustained.

Cook vs. State, 90 *Tenn.* 407.

An inspection of the Act itself will show that it was intended to prevent repetition, bribery, intimidation or other fraud in elections.

The inherent power of Legislatures to divide counties into civil districts, is conceded by plaintiff's brief. Although laws must be general, it does not follow that, in dividing counties into civil districts, the Legislature may not divide some by direct Act and others through the agency of the County Court.

There may be special reasons addressing themselves to the wisdom of the legislature. But this is a question arising under State Constitutions and laws, for the State Courts to decide.

In any case, plaintiff can not in this proceeding assert any supposed right of his County, as a quasi public corporation to attack the Act in question. He was accorded every privilege accorded all other voters of his County.

We submit that this case is without merit and shows neither cause of action nor a Federal question.

Respectfully submitted,

JEROME TEMPLETON.

APPENDIX TO BRIEF

Tennessee Election Laws. Provisions of Dortch Law. Shannon's Code of Tennessee

Section 1189. "Applies to Counties of 50,000 or more inhabitants and towns and districts of 2,500."

"In all Civil Districts, Wards and voting precincts in counties which have a population of 50,000 or over that number, computed by the federal census of 1890, or which may hereafter have that number or over computed by any subsequent federal census; and in all cities, towns and civil districts having a population of 2,500 or over that number, computed by the federal census of 1890, or may hereafter have that number or over, computed by any subsequent federal census; each and every voter, in addition to the other regulations required by law, shall be registered as a voter as hereinafter provided before he shall be allowed to exercise the elective franchise in any election held in any civil district, ward or voting precinct, in said counties having a population as herein provided;

Provided, That the last published census shall control in every case.

(Act Extra Sess. 1890, Ch. 25, Sec. 1; Act 1891, Ch. 224, Sec. 1; Ex. Ses. 1891, Ch. 12).

Section 1191. "A board of three commissioners of registration, two of whom shall constitute a quorum for the transaction of business, shall be appointed by the governor for each county in which the provisions of this article require the registration of voters in the whole of said county, or in any city, town or civil district, and said commissioners shall be citizens of and qualified voters, as provided by law, in the counties for which they are appointed and of whom not more than two shall be of the same political party * * *."

Section 1193. "It is also made the duty of said commissioners of registration, and the power and authority is hereby conferred upon them to appoint at some convenient period, prior to all elections held under the provisions of this article one of the three judges and one of the two clerks of election in each ward and district and voting precinct of the city or county to which this article applies; and the County Courts, Mayors and Boards of Mayor and Aldermen and Sheriffs, in the counties and cities within the provision of this article, are hereby divested of the authority to appoint more than two of said three Judges and not more than one of the two clerks of said elections; and the County Courts, Sheriffs, Mayors and Boards of Mayor and Aldermen in making the appointment of the other two Judges shall appoint one from each of the political parties most numerously represented in such ward or districts or voting precincts of said cities or counties."

Act 1891, Ch. 224, Sections 2 and 3.

Section 1199. "No voter shall be allowed to vote in any election wherein registration is required by law, unless he shall have first registered, under the provisions of this article, as much as twenty days before the election wherein he offers to vote, is held * * *."

Section 1211. "All persons qualified to vote under existing laws at the date of his application, or who may become qualified by reason of his arriving at the age of twenty-one years by the date of the elections for which the registration is had, or who will be qualified by reason of having resided in the State for twelve months and county six months by the date of said elections, shall be entitled to be registered as a voter under this article."

Amendment to Ch. 224, Sec. 2 and 3, of the Act of 1891.

"Be it enacted, etc., that Section 3 of the said Act, be and it is hereby amended, by adding thereto the following: It is also made the duty of said commissioners of registration and the power and authority is hereby conferred upon them, to appoint prior to all elections held under the provisions of this Act, the three Judges and the two clerks and officer or officers to hold such elections to

the exclusion of the Sheriffs and Coroner or other officer or person heretofore possessing said power of appointment of elections in each ward and district and voting precinct of the city or county to which this act applies, and the County Court, Mayors and Boards of Mayor and Aldermen and Sheriffs in the counties and cities within the provisions of this Act, are hereby divested of the authority to appoint said officers, judges and clerks of said election. All three of the judges shall not be from the same political party, if persons from different political parties are willing to serve; and they shall be appointed from the two political parties most numerously represented in such ward or district.

Acts of 1897, Ch. 16, pg. 139.

General law before Acts of 1890 and 1891 and Amendment thereto, and yet in force in other counties.

Shannon's Code of Tennessee.

Section 1178. "The sheriff or if he is a candidate, the coroner, or if there be no coroner, some person appointed by the County Court, shall hold all popular elections; and said officer or person shall appoint a sufficient number of deputies to hold said elections."

Section 1181. "The County Court, at the session next preceding the day of election; shall appoint three inspectors or judges, for each voting place, to superintend the election."

MANNER OF VOTING.

Shannon's Code of Tennessee.

Section 1245. "The officer in each county whose duty it is to hold the election and appoint polling places therein, as herein provided for, shall cause the same to be suitably provided with a sufficient number of voting shelves or tables, at or on which voters may conveniently mark their ballots. Each compartment, table or shelf shall be so arranged that it shall be impossible for one voter at one table, or in one compartment, to see another voter at another table or compartment in the act of marking his ballot. The arrangement shall be such that neither the ballot boxes nor the voting shelves or compartments, shall be hidden from the view of the judges of election or those just outside a guard rail which may

run in front of the ballot box. The number of such voting shelves, tables or compartments shall not be less than three for every one hundred voters qualified to vote at such voting places * * *."

Section 1247. "Upon receipt of his ballot, the voter shall forthwith enter the room in which the voting is to take place and present to the assistant registrar, his blank ballot and certificate of registration, provided the registrar shall, upon demand, of any voter made at the time his ballot is handed to him, give to such voter a correct statement of the order in which the title of the various offices to be filled, stand upon the particular ballot furnished to such voter. The assistant registrar shall then number the ballot upon the stub thereof and also place upon the certificate of registration the same number."

Section 1248. "He shall then go to one of the voting shelves, tables or compartments and shall prepare his ballot by marking in the appropriate margin or place, a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefor and marking a cross (X) opposite thereto. * *."

Section 1251. "He shall then vote in the manner provided by law. He shall mark and deposit his ballot without undue delay and shall quit said inclosed place or room as soon as he has voted. No such voter shall be allowed to occupy a voting shelf, table or compartment already occupied by another, nor longer than ten minutes if other voters are not waiting, nor longer than five minutes if other voters are waiting."

Act of 1899, Ch. 163, Pg. 311.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That there are hereby created and established for and within the County of Rhea, in this State, and in lieu of the fourteen civil districts therein, as now laid out, four civil districts only," setting out their boundaries.

Passed April 7, 1899.